

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5037 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements? YES

2. To be referred to the Reporter or not? NO :

3. Whether Their Lordships wish to see the fair copy : NO
of the judgement? NO

4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? NO

5. Whether it is to be circulated to the Civil Judge? : NO
NO

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Versus

STATE OF GUJARAT

Appearance:

MR PARESH UPADHYAY for Petitioner

MR KG SHETH WITH MR SP HASURKAR for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 15/09/1999

ORAL JUDGEMENT

1. Through this petition as amended, the petitioner challenges the communication dated 24/5/1999 Annexure 'A' and communication dated 24/8/1999 Annexure 'B' to the petition.

2. The brief facts leading to this petition are that, by the reporting officer for the period 1/5/1996 to

13/8/96, a part of the Calender Year 1996, the following entry in column 5 of the Confidential Report was made :-

"The quality of reporting needs improvement.

Also the works of persons working under him the appraisal was not objective."

By the communication dated 17/8/98 of the Deputy Secretary, Revenue Department, State of Gujarat, the petitioner was informed of the aforesaid entry. However, the said communication stated that the entry is not being treated adverse, but is communicated as advisory for future improvement in the field and no representation against shall be entertained. Yet, the petitioner made a representation dated 26/11/1998 about the said entry and asked for its expungement. No response to that was received by the petitioner. Thereafter, by impugned communication dated 24/5/99, the petitioner was informed in supersession of the letter dated 17/8/98 that the aforesaid entry not to be treated as advisory, but as adverse and he may may make a representation against the same, if he is so advised within a period of six weeks from the receipt of this communication. The petitioner sought extension of time beyond six weeks, vide letter dated 30th June 1999. Though the petitioner had asked for six weeks extension of time, he was granted three weeks extension by letter dated 17/7/1999. Meanwhile, the petitioner filed this petition on 13th July 1999. On 27th July 1999, the petitioner again demanded for further extension of time by one month which request was not granted by the Department and by order dated 24th August 1999, the above entry now communicated as adverse was confirmed.

3. The principal contention of the petitioner in connection with the aforesaid entry is that the change in the attitude of the department is actuated with malice inasmuch as the petitioner has preferred a Special Civil Application No.3779/99 challenging non-appointment of the petitioner on the post of Selection Grade Gujarat Administrative Service Class I where persons junior to him has been so appointed. In that petition, notices were issued on 21st May 1999 and an interim order was also passed in favour of the petitioner, restraining the respondents that if the departmental promotion committee has taken any decision to promote the officers other than the present petitioner, especially those who are junior to the petitioner, then such promotion should not be effected to or implemented so far as the juniors to the petitioners is / are concerned and the notices and the order had been served on the respondents. Spurt by this

adverse order, the respondents reacted by issuing the communication dated 24/5/99 and consequently, without considering the application of the petitioner in proper perspective for extension of time, during the pendency of the present writ petition in which notices have been issued on 23rd August 1999, the order dated 24th August 1999 has been made. The order dated 24/8/1999 has been challenged by amending the petition on additional ground of having been made in breach of principles of natural justice.

4. The first issue is whether the communication dated 24/5/99 is a direct result of the petitioner's Special Civil Application No.3779/99 and orders made thereunder or is otherwise a bonafide decision taken by the respondents on administrative grounds and whether confirmation of adverse entry is in breach of principles of natural justice.

5. So far as the actual reporting is concerned, there is no alteration in it and it remains the same as it was originally communicated and if it can be used to the detriment of the petitioner by considering to be adverse, the same cannot be used unless it is communicated to the incumbent and he has an opportunity to make a representation against it for its modification or expungement. The communication of the entry soon after it was made is not a fact in dispute. Therefore, the question of its user as it is by any authority who is to take into account the Annual Confidential Reports cannot be denied solely on the ground that it is not a communicated remark. How it is considered by those who has to act on it does not depend upon solely on the basis how the reporting officer constitute it. If the matter would have rested at that, there would not have been any difficulty. But the petitioner was informed by the concerned officer while communicating the remarks that it is not to be treated as an adverse and no representation against it shall be entertained, the question arises for further consideration. Since the petitioner had made reference to the representation that has been made and the copy of which has been placed on record by the respondents, the record of proceedings and the time chosen to issue communication dated 24/5/99 prima facie lend credence to plea of lack of bonafide which led to issuance of the letter dated 24/5/99.

6. Having perused the representation made by the petitioner dated 26/11/1998 and the reply affidavit filed by the respondents as well as the record of proceedings, I am of the opinion that the issuance of letter dated

24/5/99 incidentally issued in the proximity of time with the making of an order in Special Civil Application No.3779/99, had no connection with it and plea of malice cannot be founded on that fact. The petitioner's own representation dated 26/11/1998 goes to show that, notwithstanding the communication dated 17/8/98, he felt that the report is not of an innocuous nature and is likely to affect him adversely in the matter of his future growth in the career and therefore, he asked for expungement of those remarks which were communicated to him by way of advice. The record of proceedings goes to show that it is while considering this representation, the Additional Chief Secretary on 4th January 1999 sought explanation from his office in what context and how the aforesaid letter dated 17/8/1998 has been issued. It may be noticed that note is prepared by office in Gujarati and signed by Additional Chief Secretary in English. There is some discrepancy in date of representation and date of signature reads 4/1/98, but taking the continuous nature of proceedings and subject matter of record, these dates are apparently inadvertent slip of pen. After getting the explanation, the matter was referred to the General Administrative Department for its opinion on 23rd February 1999 and the first notings by the GAD dated 26/2/99 discloses that "In the DPC Meeting of 10/12/1998, it was considered unanimously that the remarks in question to be adverse and not advisory. In view thereof, it was advised that as the remarks are adverse, the representation should be obtained from the incumbent and should be disposed of in accordance with the general orders on the subject". This has ultimately resulted in issuance of the letter dated 24/5/99. These considerations has taken place much before the Special Civil Application No. 3779/99 was filed and keeping in view that the petitioner's own immediate reaction the entries to be detrimental to his promotional chance leaves no room of doubt that the review of the earlier opinion by the competent officer had no connection with the later controversy that has arisen between the petitioner and the respondent in connection with his non-selection to GAS Class I. Therefore, the communication dated 24/5/99 cannot be faulted with on the ground of malice.

7. However, while considering the order dated 24th August 1999, it is revealed that the entry has been confirmed solely on the ground that the petitioner has not submitted any representation in response to the letter dated 24/5/99 and therefore, for want of any representation, the same has been confirmed. This order in my opinion must be held in breach of principles of

natural justice, in the facts and circumstances of the present case, and cannot be sustained. As noticed above, the very foundation of the initiation of giving the notice dated 24/5/99 was the representation of the petitioner dated 26th November 1998 requesting the respondents to expunge the said remarks. The fact that the respondents taking the clue from the petitioner's representation became alive to their mistake and issued notice on 24/5/99 inviting objections, does not permit them to ignore pending representation which remains undisposed of on the spacious ground of not receiving any reply to the letter dated 24/5/99 when such representation in fact was already with them. This clearly reflects a closed mind with which the issue has been considered. The order dated 24/8/99 cannot therefore be sustained for the simple reason that this has been made without application of mind to the material which was before the authorities. The fact that the authorities granted fresh opportunity to make the representation and the petitioner could have made a fresh representation does not make the representation already made by the petitioner as non est, on which no decision can be taken on particularly when the very foundation of reviewing its communication dated 17/8/1998 was the representation of the petitioner and consideration by the authority, whether the same is to be considered or not in view of its earlier communication. Once it reacted to the representation dated 26/11/1998 in tune with petitioner's apprehensions, the same could not have been ignored while taking any decision. In that representation, the petitioner has also asked for personal hearing.

8. In the result, this application is partly allowed. The order dated 24/8/1999 is quashed and the respondents are directed to decide the representation of the petitioner against the aforesaid entry in question afresh in accordance with law by giving him a fair opportunity of hearing, permitting him to file additional representations, if any, in addition to the letter dated 24/5/99 and affording him personal hearing, if the rules do not prohibit the same. Rule is made absolute to that extent. No orders as to costs.

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